on social media that is seen by millions of people. Further, for those who are not on social media, telephone communication devices are now so efficient that a telephone call can be made instantaneously to any person in the world. Many people carry a mobile telephone in their pocket at all times.

We also have news at our fingertips. No longer must we wait for the paper to be published in a morning or afternoon edition. We are now able to access the news from anywhere in the world instantly. A shot fired in the US is now news in Australia within seconds.

The result of the onslaught of communication in the past few years is that it is apparent in a much shorter time that a person will never return home. The presumption of death period of seven years that was established in past centuries is no longer relevant in the digital age. It is time to consider amending the seven year requirement for presumption of death. ■

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1. Australian Federal Police, www.missingpersons.gov.au/about-us/faqs, accessed 28 October 2015.
2. *Births, Deaths and Marriages Registration Act 1996* (Vic), s6.
3. Note 2 above, s39.
4. Note 2 above, s37.
5. *Coroners Act 2008* (Vic), s3.
6. Note 5 above, s4.
7. Note 5 above, s4(2).
8. Note 5 above, s4(2)(a).
9. Note 5 above, s67.
10. *Supreme Court (Administration and Probate) Rules 2014*, r2.04(d)(ii). In the UK, there is an ability to apply for a presumption of death certificate, but the requirements are not vastly different from the common law: *Presumption of Death Act 2013* (UK).
11. Note 10 above, r 2.04(3).
12. Note 10 above, r 4.04.
13. Note 10 above, rr 2.04(5) and 4.04(5).
14. *Administration and Probate Act 1958* (Vic) s7(1), which provides that the court can grant probate on direct evidence of death; *Supreme Court (Administration and Probate) Rules 2014* (Vic), rr 2.04 and 4.04 which state evidence can be adduced on inference of death.
15. *In The Estate of Troedel, David James* [1974] VSC 413 (17 October 1974), Gillard J.
16. Boaden et al, *Wills, Probate and Administration Service*, [19,361].
17. *Administration and Probate Act 1958*, s8.
18. *Chard v Chard* [1956] 32 All ER 721. The seven year requirement can be found in the *Property Law Act 1958*, s184 and many older statues and cases, many of which date to the 19th century.
19. Note 18 above, *Chard v Chard*.
20. (1937) 59 CLR 395.
21. *Guardianship and Administration Act 1986* (Vic), s60AA.
22. Note 21 above, s60AB(2).
23. *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723.
24. *Re NSW Trustee and Guardian (Estate of Urso)* [2013] NSWSC 903 at [39].

Where there's a will

Following a recent Court of Appeal decision where the Court confirmed the trial judge's finding that suspicious circumstances arose to cast doubt on a willmaker's approval of his will, this article looks at processes that may assist solicitors when preparing wills for elderly or infirm clients.

BY JUSTIN RIZZI AND DAVID SONENBERG

SNAPSHOT

- Where suspicious circumstances exist in the making of a will, executors must prove that the testator knew and approved of the will.
- In *Veall*, the Court found that the testator did not know and approve of his will, even though a solicitor read over the will with the testator before it was signed.
- When making wills for elderly clients, solicitors must implement processes that encourage best practice will making in order to avoid circumstances that arouse suspicion.

Arthur Keith Veall (Keith) was an expert marksman and champion live pigeon shooter.[1] He taught his grandsons Nicholas and Oliver, the children of his youngest daughter Kim, to shoot. Keith hoped they would follow his passion for target shooting and had always intended to leave them his two prized Perazzi shotguns, as reflected in his earlier wills. A few years before he died, Keith presented a shotgun each to Nicholas and Oliver, but they had to be held by Keith's friend because his shooters' licence had lapsed.[2] So when his last will was changed to leave his prized shotguns to his son Rowland, suspicious circumstances arose.

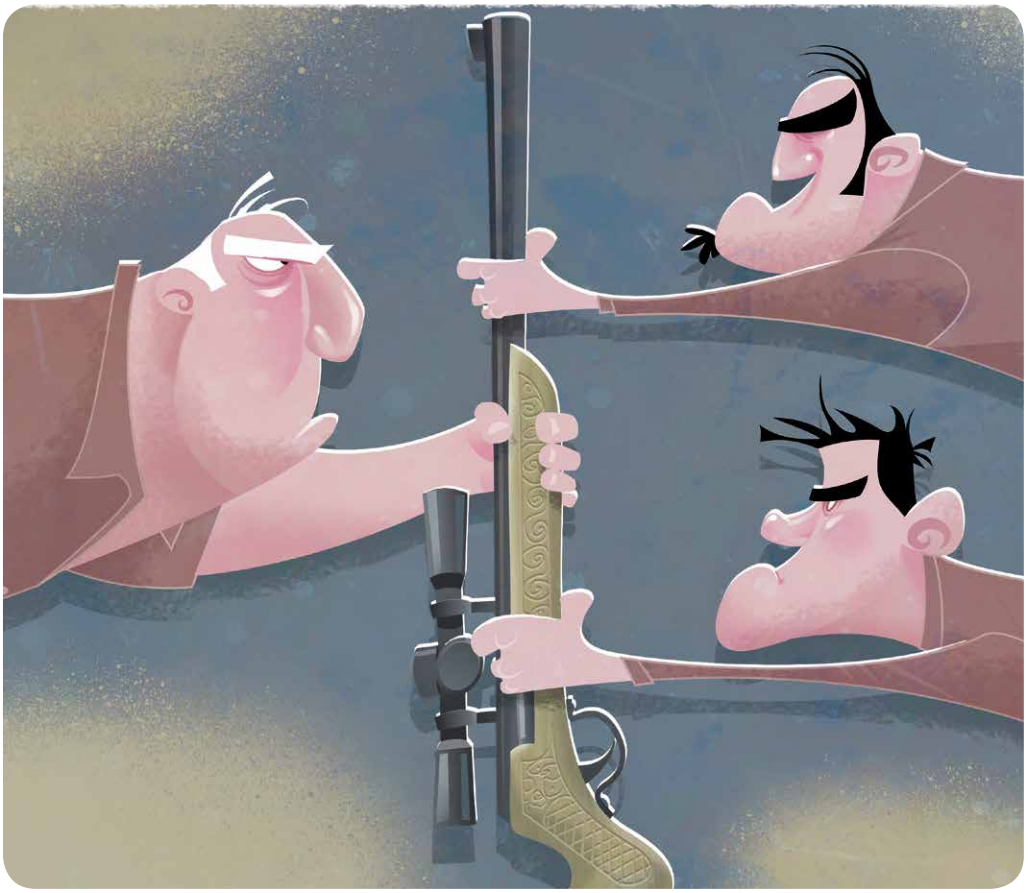
Applicable principles

Suspicious circumstances

In the absence of suspicious circumstances, if the testator had testamentary capacity and his or her will was properly executed, there is an assumption that the testator knew and approved of the contents of the will.[3] However, where there are circumstances that excite the suspicion of the court, that presumption does not arise and the propounders of the will must prove that the testator knew of and approved the contents of the will, thereby removing the suspicion. In such a case, it must be determined whether the testator "actually knew the substantive content of her will and approved of that content"[4] at the time it was executed.

Standard of proof

Where there are suspicious circumstances, the court must give the evidence "vigilant and jealous scrutiny"[5] and be satisfied on the balance of probabilities that the testator knew and approved of the contents of the will. However, pursuant to s140(2) of the *Evidence Act 2008* (Vic) and the principles stated in *Briginshaw v Briginshaw (Briginshaw)*,[6] in deciding



whether it is so satisfied, the court is to take account of the circumstances of each case. *Briginshaw* dictates that reasonable satisfaction should not be produced by "inexact proofs, indefinite testimony, or indirect inferences".[7]

The wills of Keith Veall

Keith died on 13 October 2011 aged 91. His last will, executed on 10 December 2010[8] (the December will), was prepared by an experienced solicitor. The December will was different from the several previous wills Keith had made. In his earlier wills, he appointed his eldest two children as his executors, made similar specific legacies (including his prized shotguns to his grandsons) and divided his residuary estate equally between his three children.

In the December will, Keith appointed his eldest son Rowland and Rowland's wife as his executors, changed the specific legacies (including his prized shotguns to Rowland instead of his grandsons) and divided his residuary estate equally between his two eldest children to the exclusion of Kim. In his December will, Keith also made express reference to a parcel of shares that had been his largest asset, but those shares had always been held in a trust and had been sold several years before.

The trial

At trial, Kim challenged the validity of the December will on two grounds – first that Keith lacked testamentary capacity shortly before and at the time he executed the will and second that he did not know and approve the contents of his will. The trial judge was satisfied that Keith had testamentary capacity at the relevant times even though he suffered from impaired cognition. However, the trial judge was not satisfied that Keith knew and approved of the contents of the December will, notwithstanding that it was prepared by an experienced solicitor who testified that he read the will to Keith before he signed it. The trial judge therefore refused to admit the December will to probate.

The appeal

Rowland appealed against the trial judge's finding that Keith did not know and approve of the December will. Kim filed a Notice of Contention, seeking to both affirm the trial judge's decision on knowledge and approval and contend that the trial judge erred in finding that Keith had testamentary capacity at the relevant time.

On appeal, Santamaria JA, with whom Beach and Kyrou JJA agreed, upheld the notice of contention by finding that Keith was not able to evaluate the claims upon his estate when he made the December will and therefore lacked testamentary capacity. Further, Santamaria JA was not persuaded that the trial judge erred in finding that Keith did not know and approve of the contents of the December will.

Santamaria JA explained that the concept of knowledge and approval is traditional language for stating that the will represents the testamentary intentions of the testator.[9] His Honour noted that "testamentary capacity" and "knowledge and approval" are distinct concepts, the former being a necessary but not sufficient condition for the establishment of the latter.[10]

Santamaria JA listed several examples of suspicious circumstances in Keith's case including:

- when he made his last will, he was aged and infirm, declining both physically and mentally, very hard of hearing and was signing anything that was put in front of him
- the December will departed radically from his previous wills, and in particular the change relating to the prized shotguns
- the December will conferred particular benefits upon his son Rowland to the exclusion of his daughter Kim
- the December will included assets that had already been disposed of and reflected different assets to those stated in a family law affidavit of financial position sworn only days earlier.[11]

Rowland felt a strong sense of grievance because Kim and Beryl (Kim's mother and Keith's second wife) received a disproportionate share of Keith's considerable assets several

years earlier. Although Rowland was kept away from its actual execution, the court found that the December will was itself created "within a matrix of sustained activity that was designed to increase Rowland's participation in Keith's estate".[12] Part of that activity was the assistance Rowland provided Keith with his family law proceedings against Beryl. At the time, the family law lawyer requested another practitioner to assist with Keith's will-making, but failed to provide the will lawyer with a medical report relating to Keith's infirmity. The will lawyer did not open a file, nor keep notes of his attendances with Keith. In addition, Santamaria JA found that there were several aspects of the will lawyer's evidence that were unreliable.[13]

Involvement of solicitors in preparing a will

The fact that a will was prepared by a solicitor and then read over to the testator provides powerful evidence that it represents the testator's intentions.[14] However, Santamaria JA referred to several decisions where suspicious circumstances were not dispelled, despite the involvement of a solicitor.

For example, in *Legg v Duncan*[15] Needham J was not satisfied that the testatrix knew and approved of the contents of her will, despite accepting evidence of the solicitor that the entire will was read over to the testatrix by him. The solicitor's evidence was that after having the will read to the testatrix, she said, "Yes, I understand the contents of the will" or words to that effect.[16]

In *Brand v Brand*[17] a solicitor who had prepared several prior wills for the testatrix, prepared a last will that departed significantly from her previous wills. The judge accepted evidence that the solicitor had read out the will to the testatrix before it was executed, although the solicitor could not give evidence as he had died before the trial. In that case, the propounder failed to remove the suspicion and the court was not satisfied that the testatrix knew and approved of her will.

In *Pates v Craig*[18] the testatrix's will was prepared and executed in the presence of a solicitor, who was the long-term solicitor of the sole beneficiary. The beneficiary arranged the appointment, drove the testatrix to the solicitor's office and waited outside while the will was being executed. The solicitor gave evidence that she read and explained the contents of the will to the testatrix, however neither the solicitor nor the other witness to the execution of the will kept written notes. The court was not satisfied that the executrix had testamentary capacity. It also noted that the evidence gave rise to "sufficient suspicion as to rebut the prima facie presumption of knowledge and approval".[19]

In *Hawes v Burgess*[20] the Court of Appeal in England examined a trial judge's decision on knowledge and approval of a 2007 will. The will was made by an independent solicitor experienced in drafting wills, who explained the will to the testatrix before it was executed. The testatrix's 1996 will divided her residuary estate equally between her three children. Prior to the creation of the 2007 will, two of the testatrix's children, Julia and Peter, had a falling out with each other, although the deceased remained close with both children. Julia made the appointment with the solicitor on her mother's behalf, took her mother to the firm's offices and remained in the room with her both during the taking of instructions and when the will was executed. The 2007 will excluded Peter from the residuary estate. The solicitor kept a note in which he recorded that, in his opinion, the testatrix was "entirely compos mentis".[21] However, his note (and part of the will) contained factually incorrect details of family arrangements that were inserted to explain the exclusion of Peter from the residuary estate. Further, there was evidence before the court that the testatrix had not had an opportunity to check and approve the contents of the draft will before she went to the solicitor's office to execute it. The Court of Appeal found that the testatrix did not know and approve of her 2007 will.

By contrast, in *Barbon v Tessari*[22] a testatrix's last will that radically departed from her previous will was admitted to probate, despite a challenge from her daughter on knowledge and approval. The testatrix's previous will provided for her estate to be divided equally between her children, Lucia and Harry, whereas her last will excluded Lucia and left her entire estate to Harry. McMillan J was not persuaded that the departure from her previous will was suspicious because the testatrix included in her will specific and understandable reasons for the substantial change.[23]

Lessons for preparing wills

The cases referred to above show the level of skill and attention required by solicitors when preparing wills for elderly or infirm testators. It is recommended that solicitors involved in will preparation in such situations follow appropriate procedures.

- Meet with the testator in the absence of beneficiaries or any other interested persons. Similarly, the will should be executed in the absence of any interested persons.
- Ask detailed questions to the testator to determine testamentary capacity. Such questions should ascertain in sufficient detail whether the testator understands the nature and effect of a will, the extent of the property being disposed of, and the claims to which they ought to recognise.
- If any doubts are raised as to capacity, with the consent of the testator the solicitor ought to seek the opinion of a doctor who has been treating the testator and is familiar with him or her. The doctor should thoroughly examine the testator, question him or her in detail and report to the solicitor as to the capacity and understanding of the testator. If possible, the same medical practitioner should witness the execution of the will.
- Time permitting, the will should be sent to the testator to read over carefully at least a few days prior to its execution. Immediately prior to its execution, the testator should read over the entire document in the presence of the witnesses and be encouraged to discuss any issues that are unclear.
- Solicitors should be extra vigilant in circumstances where the instructions include a radical departure from long adhered to testamentary intentions, especially where the change is in favour of a person who has influence and authority over a testator. To this end, reviewing the existing

wills of the testator is important and the solicitor should examine any substantial departure from previous wills and seek reasons for any change.
- Detailed file notes (preferably typed) should be made by the solicitor, including the instructions given by the testator, the results of the medical examination, discussions with the doctor and the circumstances surrounding the execution of the will.
- it is a good general practice for the solicitor who took instructions to both draw the will and be present on its execution.

Practitioners should note that where a will is found invalid in suspicious circumstances that question the knowledge and approval of a testator, the solicitor involved may face a claim for damages from disgruntled beneficiaries.

Conclusion

The case of *Veall* highlights the important role solicitors play in creating valid wills for elderly or infirm clients. It also provides useful examples of circumstances that excite the court's suspicion and those that ought to put prudent solicitors on notice.

Making wills for elderly or infirm clients is an important and difficult task. Solicitors that implement processes that encourage best practice willmaking should succeed in avoiding circumstances that arouse suspicion. Such practices help to ensure that the wishes of the client are adhered to and that costly litigation is avoided. ■

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1. Victoria banned live pigeon shooting in 1956. It was the last state in Australian to do so.
2. *Veall & Anor v Veall* [2014] VSC 38 (19 February 2014) [352].
3. *Nock v Austin* (1918) 25 CLR 519, 528 (Isaacs J).
4. *Barbon v Tessari* [2015] VSC 490 (11 September 2015) at [155].
5. *McKinnon v Voigt* [1998] 3 VR 543, 554 (Tadgell JA).
6. (1938) 60 CLR 336.
7. Note 6 above, 362 (Dixon J).
8. Note 2 above, at [105]; Ginnane J found that the will was executed on 10 December 2010, but the date on the will was erroneously written as 10 December 2011.
9. Note 1 above, at [173].
10. Note 1 above.
11. Note 1 above, at [199].
12. Note 11 above.
13. Note 1 above, at [227].
14. Note 9 above, at [173].
15. Unreported, Supreme Court of New South Wales, Needham J, 11 March 1987.
16. Note 15 above, 15.
17. Unreported, Supreme Court of New South Wales, Rolfe J, 10 December 1991.
18. Unreported, Supreme Court of New South Wales, Santow J, 28 August 1995.
19. Note 18 above, 34.
20. [2013] EWCA Civ 74 (Mummery and Patten LJJ and Sir Scott Baker).
21. Note 20 above, at [25].
22. [2015] VSC 490 (11 September 2015).
23. Note 22 above, at [171].